



Legal Update

February 2018

The Appeals Court held that police had reasonable suspicion to stop the defendant and search his backpack even though the encounter occurred 6 hours after a home invasion, the description of the suspects was general, and the judge who denied the defendant's motion to suppress improperly took judicial notice of demographic data.

Commonwealth v. James Charles Hilaire, 92 Mass. App. Ct. 784 (2018): On July 29, 2014, at approximately 3:05 A.M., East Bridgewater police responded to the North Central Street to investigate a report of an armed home invasion with shots fired. A large amount of cash and jewelry were taken and the suspects were described as several young black males. Two of the suspects were carrying backpacks. There was no further description of the men, their features, or their appearance, except that they were said to be wearing "regular clothes."

A short time after the home invasion, three black men fled from a red Toyota Camry in front of 505 North Central Street, leaving the doors of the vehicle open as they ran into neighboring woods. North Central Street was only about 100 yards from the location of the home invasion. Police responded to the scene and Officer Talitha Connor remained near the abandoned Toyota. While in position, Officer Connor observed a black Acura driving

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up and down North Central Street. Officer Connor stopped the vehicle and asked the driver, Ashley Smith, what she was doing. Officer Connor let Smith drive away, but she wrote down the vehicle's registration number that she was lost and trying to get back to Brockton.

Officer Dennis Andre patrolled the area for the two suspects who remained at large in connection with the home invasion. At approximately 7:15 A.M., Officer Andre stopped a dark-colored sedan after it "banged a U-turn" in the middle of an intersection during a red light. Ashley Smith was driving the vehicle and she told Officer Andre that she was trying to get back to Brockton. When Officer Andre returned to the station, he learned about Officer Connor's earlier encounter with Smith and confirmed that she was the same person driving the same vehicle.

Around 8:00 A.M, Officer Andre again observed Smith driving the same vehicle and talking on the phone. Smith was driving into East Bridgewater towards the North Central Street area. Officer Andre stopped the vehicle and asked Smith why she had returned to East Bridgewater given her earlier repeated statements about wanting to return to Brockton instead. Smith stated that she was returning to her mother's friend's house. Smith gave Officer Andre consent to look at her phone, where he saw a recent text message time-stamped 7:51 A.M. that read, **"Did you pick him up yet?"** Although Smith told police she knew nothing about the message, she acknowledged that the cell phone had been in her possession all day. Police brought Smith back to the station for further questioning. Officer Andre returned to his patrol and he spotted a black male wearing backpack and walking one-half mile from the home invasion. Officer Andre approached James Hilaire, the Defendant, and asked him where he was coming from. Officer Andre said he wanted to look in the Defendant's backpack, and the judge found that "[t]he Defendant did not argue but rather acquiesced to [Andre's] request." Inside were large amounts of **currency and jewelry.**

The Defendant was indicted on armed home invasion, armed robbery while masked, and unlawful possession of a firearm. The Defendant filed a motion to suppress arguing that the police lacked reasonable suspicion to stop him. The Defendant claimed that the lack of particularity in the description of the suspects (young black men wearing regular clothes and backpacks), and the temporal (six hours) and spatial (one-half mile) distance from the crime failed to establish reasonable suspicion. At the motion hearing, the judge found that "the physical description of the suspects was general and lacking in detail, the area was not considered a high crime area and the Defendant took no evasive action when police confronted him. Most important, over six hours had elapsed between the time the suspects fled into the woods and the time the Defendant was stopped. Additionally, the judge determined that Officer Andre seized the Defendant when he asked to look in the Defendant's backpack.

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The judge expanded his findings further when he took judicial notice on his own initiative that the African-American, black population of East Bridgewater is decidedly small. According to the records of the United States Census Bureau, less than 1% of the population of East Bridgewater was black or African-American as of July, 2014. Although there was no evidence presented on point about this issue, the judge found it not likely that there is a large number of men in East Bridgewater that would match the description of the suspects. Based on the judge's additional findings, the Defendant argued that it was improper for the judge to consider demographic data as a factor in the reasonable suspicion analysis.

Conclusion: The Appeals Court found that the police had reasonable suspicion to stop the defendant even though the motion judge improperly expanded the factual record of the motion hearing when he took judicial notice of demographic data.

1st Issue: Did the judge improperly take notice of demographic data?

The Appeals Court held that the judge should not have taken judicial notice of demographic data to support his conclusion that reasonable suspicion existed. The information was not relevant either to (1) determining the moment the Defendant was seized in a constitutional sense, or (2) determining whether, at that moment, there was reasonable suspicion to believe the Defendant had committed, was committing, or was about to commit a crime. The latter "depends on the facts and circumstances within the officer's knowledge at the time." **Reasonable suspicion cannot rest on later-developed facts not shown to have been known to officers at the relevant time.**

2nd Issue: Did the police have reasonable suspicion at the time Officer Andre stopped the Defendant?

The Appeals Court held that even though the judge improperly took notice of demographic data, the other facts derived from the motion hearing were valid and established that the police had reasonable suspicion to stop the Defendant. For purposes of its analysis, the Appeals Court accepted the judge's finding that the Defendant merely acquiesced, and did not consent, to the taking and search of his backpack, and therefore assessed the existence of reasonable suspicion as of that moment. "Reasonable suspicion is measured by an objective standard, and the totality of the facts on which the seizure is based must establish 'an individualized suspicion that the person seized by the police is the perpetrator' of the crime under investigation." *Commonwealth v Warren*, 475 Mass. 530, 534 (2016). A general description that fails to "distinguish the suspect from other individuals" cannot alone support a finding of reasonable suspicion. See *Commonwealth v. Cheek*, 413 Mass. 492, 497 (1992).

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The Appeals Court found that if the only factor supporting the stop rested on the description of the suspects in this case (three young black males wearing regular clothes, two with backpacks), it would have been insufficient to support reasonable suspicion. However, "the value of a vague or general description in the reasonable suspicion analysis may be enhanced if other factors known to the police make it reasonable to surmise that the suspect was involved in the crime under investigation." *Commonwealth v. Meneus*, 476 Mass. 231, 237 (2017).

However, the general description of the Defendant was enhanced by the fact that the Defendant was found not far from the location of the crime and under circumstances that made it likely the suspect was still in the area. "Proximity is accorded greater probative value in the reasonable suspicion calculus." *Warren, supra* at 536. Second, even though six hours had already elapsed since the home invasion, "it was a fair inference from Smith's repeated circling of the area (which began shortly after the crime), her disingenuous explanations for her presence, the fact that she had not "yet" picked "him" up, and the fact that she was in cell-phone communication with someone on this subject not long before the defendant was spotted, that the suspect likely remained in the immediate area." See *Commonwealth v. Doocey*, 56 Mass. App. Ct. 550, 556 (2002) (the likelihood that a defendant will be found in the area where police are searching is relevant to reasonable suspicion calculus). Finally, the Appeals Court found that "the gravity of the crime and the present danger of the circumstances" also added to the reasonable suspicion calculus. Here police were investigating a serious armed robbery with shots fired. This type of crime has implication for public safety.

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